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IN THE

Supreme Court of the United States

JAMES OBERGEFELL, ET AL., *Petitioners*
v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.

VALERIA TANCO, ET AL., PETITIONERS
v.
BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL.

APRIL DEBOER, ET AL., PETITIONERS
v.
RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.

GREGORY BOURKE, ET AL., PETITIONERS
v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY ET AL.

On Writs of Certiorari
To the United States Courts of Appeals
For the Sixth Circuit

BRIEF OF *AMICI CURIAE* IDAHO GOVERNOR C.L. "BUTCH" OTTER

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QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

2. Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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INTRODUCTION AND INTERESTS OF *AMICI* [1]

As a sitting Governor, *Amicus* is concerned—for our children and our democracy—by the recent avalanche of decisions by lower federal courts imposing same-sex marriage on the States under the banner of the federal Constitution. No volume of laws, no matter how thick, and no army of law enforcers, no matter how numerous, can compensate for the weakening of a fundamental social institution like marriage. The Nation's citizens—especially our children—benefit from the social reinforcement and encouragement that man-woman marriage provides. And removing the man-woman definition and associated social understanding of marriage will sap its strength and reduce the benefits that this venerable institution currently bestows on families and States.

Amicus recognizes that advocates of same-sex marriage claim it will benefit children being raised by gay and lesbian couples. *Amicus* has the greatest respect for our gay and lesbian citizens—including their right to form whatever private romantic relationships they choose—and is deeply concerned for the welfare of their children. However, to put the issue in perspective, children raised by same-sex couples make up just one-third of one percent of the nearly 74,000,000 children currently being raised in this country. See Brief of 100 Marriage Scholars ("Marriage Scholars") at 27. No State can responsibly sacrifice the institution's proven benefits to the vast majority of children in the hope of uncertain gains for

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[1] Undersigned counsel have authored this brief in whole, and no other person or entity has funded its preparation or submission. All parties have consented to its filing.

the relatively few children of same-sex couples—especially given recent evidence that, on average, marriage of same-sex couples *harms* rather than helps the children they raise together. See American College of Pediatricians Brief.

Not only will mandated same-sex marriage bring adverse long-term effects to the States and their children, but the resulting slippery slope will produce further harm. Through our history, marriage has stood on the twin pillars of monogamy and gender complementarity. If the latter must fall under the axe of the federal Constitution—and marriage thus be transformed into a genderless institution—it is difficult to see how monogamy can be spared: If man-woman marriage laws discriminate vis-à-vis gays and lesbians, then so do monogamous marriage laws vis-à-vis bisexuals. And anything that undermines the standard of monogamy threatens even more harm to our children and the States.

Equally important, removing such an important decision as the definition of marriage from the hands of the People will damage our federal political system, perhaps irreparably. It will atrophy the muscles of democracy. It will teach our people that they are not to be trusted with self-governance on important and sensitive social issues. And it will obviate the compromise and goodwill that come from spirited democratic discussion and legislation. It will instead turn one side into unambiguous victors, and force the other's deeply rooted laws and beliefs to the margins of the public square. See Major Religious Organizations Brief at 12-14. For that reason too, the definition of marriage should be left to the People of the States.

SUMMARY

I. While rational basis is the appropriate standard for analyzing the man-woman marriage laws, in these cases, the level of scrutiny is irrelevant to the outcome because these laws pass even heightened scrutiny. Simply put, man-woman marriage laws are "narrowly tailored" to further several "compelling government interest[s]." *Grutter* v. *Bollinger*, 509 U.S. 306, 326 (2003).

Most fundamentally, man-woman marriage laws advance a State's compelling interest in the welfare of its children and their parents. By defining marriage as between a man and a woman, the State bolsters the social norms associated with the age-old institution of man-woman marriage. The central norm taught by that institution—and reflected in the man-woman definition itself—is the importance of children and their welfare. But included within that over-arching norm are more specific norms, including such things as the importance of biologically connected parenting, the worth of gender-diverse parenting, and the value of postponing procreation until someone is in a stable long-term relationship.

For children, when these norms are vibrant in families and society, the consequence is fewer fatherless (and in some cases motherless) children and less divorce, neglect and abuse. Common sense and a wealth of social science establish that children do better emotionally, socially, intellectually and economically when raised by their biological mothers and fathers—the natural outcome of these norms. This results in more children, and in the future, adults, who are more responsible and higher functioning—

and therefore require fewer state resources. These norms likewise increase the odds of a birthrate sufficient to support welfare programs into the future. These important man-woman marriage norms also help parents, particularly mothers. Accordingly, States have a compelling interest in protecting and furthering these norms.

A same-sex marriage regime, on the other hand, teaches that fathers (or mothers) are not necessary to raise children, and therefore that they need not marry their children's mothers (or fathers). Thus, redefining marriage in genderless terms—which is necessary to the accommodation of same-sex marriage—will undermine the norms of man-woman marriage, resulting in fewer marriages, more children born outside of marriage, and fewer children born overall. In fact, in many states and foreign nations that have adopted same-sex marriage, marriage rates have declined, sometimes drastically so. And as the institution of man-woman marriage is undermined, not all will be equally affected: Those on the margins of marriage—who most need the encouragement of the social norms that flow from the institution—will be the first casualties.

Man-woman marriage laws substantially advance each of these state interests—including these social norms—in a way that nothing else can. First, the man-woman definition implicitly declares that children need both a mother and a father, preferably their biological ones. Second, it subtly reinforces that marriage is the optimal setting in which to have and rear children. Third, that definition guides mothers and fathers to stay together, and to procreate with no one else. More generally, the man-woman definition

conveys the importance of putting child interests ahead of adult interests.

Accordingly, actions by States to shield man-woman marriage—and its many benefits—from judicial redefinition and from experimentation in other states substantially advance the State's compelling interests. If, for instance, man-woman marriage were not placed in a State's constitution, a single state trial judge could institute same-sex marriage. And with Massachusetts adopting genderless marriage in 2003, it was only a matter of time before married same-sex couples relocated from there to one of the other 49 states, or that couples from elsewhere traveled to Massachusetts to get married and then sought recognition of that marriage in their home states, thereby importing genderless marriage to states seeking to protect the man-woman institution. Thus, putting the man-woman definition in the state constitution and refusing to recognize out-of-state same-sex marriages ensured that the "laboratory of democracy" regime embodied in our federal system—which requires that States have the option *not* to experiment with long-standing institutions—would remain vibrant.

Man-woman marriage laws are also narrowly tailored. This Court has long recognized that laws based on biological realities can withstand heightened scrutiny, and man-woman marriage is grounded in obvious biological differences between man-woman and same-sex couples: The two are not similarly situated when it comes to procreative ability. Moreover, infertile man-woman couples are a rare exception. And it would require an enormous invasion of privacy to require that fertility be proven before marriage. In any event, the argument about fertility implicates on-

ly one of several marital norms—"channeling" procreation into stable adult relationships—and does not affect the other norms discussed above.

II. Given the numerous risks to children and society of redefining marriage, respect for federalism and democratic decision-making is especially important here. States are constitutionally free to choose between man-woman and same-sex marriage—and to change their mind down the road. But if forced to abandon the man-woman definition, there will be *no* space for states to innovate, as they could even under the trimester system that *Roe* v. *Wade*, 410 U.S. 179 (1973), provided. Moreover, the people of any States that have genderless marriage forced on them will feel like second-class citizens: They will have been denied the ability, enforced and celebrated in *U.S.* v. *Windsor*, 133 S.Ct. 2675 (2013), to choose the marriage definition they believe will best serve their children and their community—solely because their view is deemed less "correct" than the view of a majority of New Yorkers.

For all these reasons, *Amicus* respectfully urges the Court not to repeat the mistakes of its predecessors—in decisions like *Dred Scott* v. *Sandford*, 60 U.S. 393 (1856), and *Lochner* v. *New York*, 198 U.S. 45 (1905)—and deprive the People and the States of their right under our federal Constitution to make this important policy decision for themselves.

ARGUMENT

I. While respondents are correct that their marriage laws should be judged under the rational-basis standard, they also satisfy heightened scrutiny.

Respondents have persuasively shown that, under this Court's precedents, the proper standard under which to review their man-woman marriage laws is the "rational basis" standard—under which a state law will satisfy the Fourteenth Amendment if there is simply "a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller* v. *Doe*, 509 U.S. 312, 319-20 (1993). Respondents and their amici have also persuasively shown that the laws at issue here easily pass muster under that standard. See, *e.g*, Brief of Alabama at 26-29; Brief of 15 States at 10-11.

Ultimately, however, the legal standard does not control the outcome of this case. For even *if* the Court elected to apply some form of heightened scrutiny to man-woman marriage laws, they are still constitutional: They advance a number of state interests that are not only important, but "compelling." *Grutter* v. *Bollinger*, 509 U.S. 306, 326 (2003). And they are "narrowly tailored to further [those] interests." *Id.*

A. A State has a compelling interest in preserving each of the child-centric social norms historically and logically associated with the man-woman definition of marriage.

It goes without saying that, to pass heightened scrutiny, a law must further a "compelling government interest." *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 299 (1978). But that standard is not impossibly demanding. Government interests that have been found compelling include, among other things, promoting student body diversity, *Grutter*, 539 U.S. at 328; promoting uniformity of military dress, *Goldman* v. *Weinberger*, 475 U.S. 503, 509-510 (1986); and even ensuring the physical fitness of enforcement officials, *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 670 (1989).

Given that these interests have all been found compelling, it would be odd to conclude that a State does not have a compelling interest in the welfare of its children—the overarching interest served by a State's marriage laws—as well as those children's parents. States obviously have a compelling interest in the welfare of both groups. And one of the main ways a State can further that compelling interest is by promoting man-woman marriage and its associated social norms—each of which likewise gives rise to a compelling state interest.

1. The man-woman definition conveys and reinforces important social norms that benefit children.

Preserving and promoting social norms is one of the main purposes of social institutions like marriage. See Marriage Scholars at 4. And the man-woman definition of marriage conveys and reinforces a number of social norms that provide crucial benefits to children, and ultimately to the State itself. *Id.* at 4-8. These benefits cannot be provided as fully in any other way, and no program or policy can make up for what would be lost if these social norms were diluted or destroyed.

Perhaps the most important norm conveyed by the man-woman definition is the norm of "child centricity." That is the idea that marriage, while secondarily providing benefits to the couple, is primarily about the needs and welfare of any children produced by the couple. See Marriage Scholars at 8. Defining marriage as the union of a man and a woman clearly conveys the idea that marriage is principally about children—since the ability to create a child together is what makes man-woman unions unique.

Within the broad category of child-centricity, the man-woman definition conveys five more specific and equally important norms. First is the "biological bonding" norm: Where possible, every child has a right to be reared and supported by, and to bond with, her biological father and mother. *Id.* at 7-9. This also encompasses the more mundane but important "maintenance" norm—that is, every child has a right whenever possible to be supported financially

by the man and woman who brought her into the world. *Id.*

The second norm—gender diversity—is closely related to the first. It says that, where possible, a child should at least be raised by *a* mother and father who are committed to each other and to the child, even when for some reason she cannot be raised by both biological parents. *Id.* at 7, 9-11. The gender diversity norm also reinforces the idea that men and women who conceive together should treat marriage, and fatherhood and motherhood within marriage, as an important expression of their masculinity or femininity. *Id.* See also Organizations and Scholars of Gender Diverse Parenting.

A wealth of social-science research demonstrates that children raised in the same home as their married biological mother and father—and thus benefiting from both the biological bonding and gender diversity norms—are *less* likely to commit crimes, experience teen pregnancy, have multiple abortions over their lifetimes, engage in substance abuse, suffer from mental illness, or do poorly in school. See Marriage Scholars at 9, 16. They are also *more* likely to support themselves and (consistent with the maintenance norm) their own children in the future. *Id.* at 9. Accordingly, such children are less likely to need state assistance and more likely to contribute meaningfully to the State's economy and tax base. *Id.*

Similarly, the norms of maintenance (part of the biological bonding norm) and child-centricity lead to a reduction of behaviors—such as physical or sexual child abuse, neglect or divorce—that not only harm children, but often require state assistance or inter-

vention. See Marriage Scholars at 11. In those ways too, these norms substantially benefit the State.

In short, social science overwhelmingly identifies a "gold standard" setting in which children are likely to flourish emotionally, socially, intellectually, and economically: growing up in a home where they are raised by their married biological mother and father. *Id.* at 8. While other arrangements are sometimes needed and can provide enormous benefits—arrangements such as single parenting, step-parenting, or adoption—or are chosen instead of marriage, such as cohabitation, they cannot compare to the overall benefits that a married, biologically-intact home environment provides.[2] That environment confers the greatest benefits on the State as well as its children.

The man-woman definition also conveys three additional norms. First, men and women should postpone procreation until they are in a committed, long-term relationship. This is variously called the "postponement" norm, the "responsible procreation" norm

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[2] By their very definition same-sex couple family structures fall within this list of parenting arrangements. For a survey of the social science debate on the impact of same-sex family structures on children, see generally Brief of Amici Curiae American College of Pediatricians. That brief also questions whether the benefits of marriage that ordinarily flow to children of man-woman unions will automatically transfer to the children of same-sex couples. In fact, recent studies indicate that, on average, the *marriage* of same-sex couples raising children together does their children more harm than good—despite greater stability, and despite such children rating their married same-sex parents more warmly than the ratings given to opposite-sex parents by their children. *Id.* at 33-46.

or the "channeling" norm—i.e., heterosexuals' sexual behavior should be "channeled" into such stable relationships. Second, undertaken in the setting of marriage, creating and rearing children are socially valuable—what might be called the "valuing procreation" norm. And third, men and women should limit themselves to a single procreative partner—often called the "exclusivity" norm.

How are these norms tied to the man-woman definition of marriage? Here again, all of them focus on procreation, which the man-woman definition keeps at the center of marriage's public meaning. And by limiting the recognition and benefits conferred by marriage to opposite-sex couples, the State essentially says to those couples: "We think procreation is great—as long as it's undertaken in a long-term, stable marriage with one partner of the opposite sex—and we're willing to give you certain recognition and benefits if you'll agree (implicitly, by accepting marital norms) to limit procreation to that setting."

These latter norms are also important to the welfare of children. For example, people who embrace the exclusivity norm are less likely to have children with multiple partners—which usually leads to social, emotional and financial difficulties for children. *Id.* at 11. And people who embrace the postponement norm are less likely to have children without a second, committed parent—another well-established predictor of psychological, emotional and financial trouble. *Id.*

By contrast, people who do not appreciate the social value of creating and rearing children are less likely to do so. And that view, if sufficiently wide-

spread, would jeopardize society's ability to reproduce itself—at least at levels sufficient to maintain intergenerational welfare programs. *Id.* at 12. States have a powerful interest in ensuring enough children to sustain those programs. And social science establishes that maintaining a healthy marriage rate among man-woman couples is essential to that objective. See also Scholars of Fertility and Marriage, Sections II & III.

In short, common sense supports the notion that, as man-woman couples stay together and prioritize the welfare of their offspring, children will benefit enormously—and so will the State. Accordingly, preserving the demonstrated benefits of the man-woman definition and institution of marriage—along with each of the norms they convey—is a compelling state interest.

2. These norms also benefit parents, especially mothers, and the State itself.

Besides benefitting children, the norms associated with man-woman marriage also substantially benefit parents, especially mothers. For example, a man's biological connection to his child not only directly strengthens his bond with the child, but also indirectly strengthens his bond with the child's mother, thereby encouraging male protection and investment in both relationships. See Marriage Scholars at 9.[3] The norms of exclusivity, child-centricity, and maintenance also help encourage the father to stick

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[3] That relationship is like a triangle, with the child at the apex. As the father and mother draw closer via their biological bonds to the child, they naturally grow closer to each other.

around—and act in a way that the mother will want him to stay—thereby providing not only financial but emotional support to the child and the mother.

This affects the State in numerous ways. For example, "deadbeat dads" cost taxpayers tens of billions of dollars annually: Typically the State steps in to make payments or provide services, then seeks reimbursement from the fathers, which rarely comes. CNN. Similarly, households without a married mother and father are typically more likely to receive food stamps. Rank:994.[4] Conversely, married women who stay married—especially those from disadvantaged groups—are much less likely to experience poverty and receive government welfare. Lichter:60.

By contrast, the costs of family fragmentation to governments of all stripes are staggering. As of 2008, that cost was cautiously estimated at at least $112 billion annually, or more than $1 trillion per decade. Scafidi:5. These state costs come from such things as the justice system, cash assistance programs, food stamps, housing assistance, Medicaid, child welfare, Head Start, school meal programs, and lost taxes. *Id.* at 18.

Man-woman marriage also increases a State's tax base, as men experience a wage premium by entering marriage. Bardasi:569. This premium stems from both higher wages and more hours worked for mar-

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[4] Because of the number of social-science studies cited here, in-text citations are shortened, authors with multiple articles have letters following their last names to distinguish publications, and publications by multiple authors are identified by only the first author's last name. Sources appear in the Table of Authorities.

ried men compared to their single counterparts. Ahituv:623.[5] It also stems from married men receiving significantly higher performance ratings and being more likely to be promoted than single men. Mehay:63.

Additionally, upon entering fatherhood, married men tend to increase their rates of asset accumulation, whereas unmarried men upon becoming fathers generally see their asset accumulation decrease. See Dew:140. Morever, both married men and women experience a 77% increase in net worth compared to their single counterparts. Zagorsky:406. Indeed, married households have higher wealth levels than female-headed, male-headed *and* cohabitant households, with female-headed households experiencing the lowest levels. Grinstein-Weiss(b):62; Ruel:1155; Schmidt: 139. The resulting gender gap is persistent, as never-married mothers typically remain impoverished despite gains in education. McKeever:63.

The expanded tax base created by marriage also extends to property taxes: Married low-income renters buy homes more quickly and at higher rates than single, low-income renters. Grinstein-Weiss(b):475.

By contrast, cohabitation is (on average) especially hard on mothers, which in turn has a negative impact on children and the State. Indeed, married parent families experience less economic hardship, greater father involvement, and less psychological stress on

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[5] Conversely, fathers who are not married to the mother of their children and who are in child support arrears tend to reduce the weeks worked in the formal labor market. Miller:604.

the part *of the mother* than single or cohabiting parents. Bachman:263. And long-term cohabitation provides almost no psychological or health benefits to mothers, with short-term cohabitation actually *increasing* mothers' psychological and physical distress. Williams:1481.

In short, not only do children lose when their biological parents are not married, their mothers lose as well.[6] See also Scholars of the Welfare of Women, Children, and Underprivileged Populations Brief, Section III. And the State has a compelling interest in preventing or reducing those losses, with all the direct and indirect costs they impose on the State.

3. States have a compelling interest in each of these norms.

The analysis presented above should eliminate any doubt about whether a State has a compelling interest in retaining the child-centric norms associated with the man-woman understanding and definition of marriage. Children are a State's most valuable asset. A State would be derelict if it did not

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[6] Petitioners may point to some of these studies as evidence that same-sex couples and their children would be better off if those couples could legally marry. But such an argument is flawed for two reasons. First, all these studies examine the effect of man-woman marriage on *opposite-sex* couples and their children. We don't know what impact same-sex marriage will have on those couples and their children, and initial evidence indicates the effects will not be the same. *See* American College of Pediatricians Brief at 33-46. Second, even assuming the positive effects of marriage transferred in both degree and kind to children raised by same-sex couples, the negative impact of a genderless marriage regime on man-woman marriage rates will more than swamp any gains. *See* Marriage Scholars at Appendix B.

strive to protect them. Each of these norms provides valuable and independent benefits to children, parents, and society—and redefining marriage in genderless terms would threaten them all.

In addition to the mechanisms identified above, removing the man-woman definition effectively tells men they have nothing unique to contribute to raising a child, or to marriage. Given the "teaching" function of the law, *University of Alabama* v. *Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring), that removal similarly teaches men that society doesn't need them to bond to the mother of any children they conceive in order to create a stable home environment for the child. See Marriage Scholars at 14-16. Those messages seriously undermine both the biological bonding and gender diversity norms, and thereby tend to discourage heterosexual men from pursuing marriage at all. *Id.* That, in turn, subjects their children to all of the risks outlined above.

Additionally, by taking the focus off procreation, removing the man-woman definition of marriage weakens the maintenance norm—thereby placing more children and mothers at risk of having to seek child support through legal means rather than relying upon fathers' innate desires, encouraged by these social norms, to provide for their own. Likewise, redefining marriage away from the man-woman understanding will whittle away the postponement or channeling norm, likely leading to more children born out of wedlock, fewer children born overall—and perhaps even a higher number of abortions. See Marriage Scholars, Appendix B.

Finally, removing the man-woman definition will subvert the over-arching child-centricity norm—both because it takes the focus off procreation and because of perceptions that the same-sex marriage movement is largely driven by the interests of adults. Hawkins:20. That in turn will likely lead to more self-centered behavior by parents across a range of issues—including such things as how long to stay in a sub-optimal marriage; how much time, effort, and expense to spend on educational and extra-curricular activities that enhance child welfare; how much effort to dedicate to instilling values of honesty, service, and hard work; and what kind of entertainment to seek.

Of course, not all groups will be affected equally. But those at the margins of marriage will be hurt the most. And they most need the powerful "teaching" function of the law and the underlying norms of man-woman marriage to nudge them in socially-desirable directions. See Marriage Scholars at 17, 29-30; Scholars of the Welfare of Women, Children and Underprivileged Populations Brief, Section I.

Actual experience highlights and reinforces these concerns. As the Marriage Scholars show, the marriage rate among man-woman couples in U.S. States and foreign nations that removed the man-woman definition of marriage at least six years ago has declined by at least five percent—and as much as 36 percent—in the few years since that change. See Marriage Scholars, Appendix B at 14a-17a. Their brief also demonstrates that even a minimal reduction of five percent in the marriage rate would lead, over the next fertility cycle (approximately 30 years), to substantial reductions in overall births as well as

substantial increases in the number of children born out of wedlock or aborted. *Id.* at 20a-25a.

Such changes would be catastrophic for States and their citizens. And the most obvious and easiest way to avoid risking such catastrophes is to retain the man-woman understanding and definition of marriage—an understanding that has served our State well since its inception.

In short, if the state interest in maintaining the man-woman definition of marriage and its associated social norms is not compelling, no state interest is.

B. Recent state efforts to preserve the man-woman definition of marriage, including the laws at issue here, substantially advance each of these interests.

Legally defining marriage as limited to a man and a woman, as well as other efforts to bolster the man-woman understanding, substantially advance the compelling interests described above. That is true for at least two reasons.

1. The man-woman definition supports and reinforces each of these norms, thereby advancing each associated state interest.

First, by legally recognizing only man-woman marriage, a State can emphatically endorse the long-held understanding that children need and deserve both a mother and a father—the norm of parental gender diversity. The evidence shows that mothers and fathers are not interchangeable cogs in the ma-

chinery of parenting. Marriage Scholars at 9-11; Organizations and Scholars of Gender Diverse Parenting. And while the two-biological-parent ideal will sometimes not be realized because of death, divorce, or personal choice, to allow exceptions to discredit that norm is to let the tail wag the dog—to the harm of millions of children.

By contrast, same-sex marriage by its very definition means parental gender is irrelevant to children—that boys do not need fathers, nor girls mothers (and vice versa). *Id.* And that notion contradicts not only common sense, but extensive social science research. *Id.* No other marriage regime that the State could adopt—certainly not the genderless regime pushed by the Petitioners—so fully and perfectly promotes parental gender diversity.

Likewise, man-woman marriage laws both flow from and bolster the biological bonding norm—that children need and deserve to know their biological mother and father. Marriage Scholars at 8-9. Genderless marriage laws mean some children will be raised in a family structure in which they are raised by at most one of her biological parents—maybe neither. Certainly step-parent or adoptive parent situations are immensely better than orphanages or child homelessness. But one of the functions of man-woman marriage laws and the norms they convey is to give children a fighting chance at the "gold standard" of parenting—knowing and being raised by their biological mother and father. In a genderless marriage regime there is nothing to convey that standard to heterosexual parents or potential parents.

Man-woman marriage laws also substantially boost the channeling, maintenance and exclusivity norms taught by the institution of marriage. By retaining the man-woman definition, the State endorses the norm of having men and women wait until in the stability of marriage to bring children into the world. *Id.* at 8, 34. That definition likewise reinforces the expectation that any children that come to the marriage will be card for financially, as well as emotionally, by the legal *and* biological union that produced the child. *Id.* at 7.

Finally, by limiting marriage to a man and a woman, the State strongly promotes the exclusivity norm. That is, it encourages opposite-sex couples—the only type of couples that physically can procreate—to do so only in the confines of that legal union. *Id.* at 8. By contrast, a genderless marriage regime severs procreation from marriage, severely eroding—if not eliminating—the channeling and exclusivity norms. *Id.* at 14-15. That is bad news for children and, therefore, the State.

In sum, man-woman marriage is primarily about children, secondarily about adults. Genderless marriage blurs these priorities, and it is children who will bear the brunt of such a reprioritization. For all the reasons explained above, each State has a powerful interest in avoiding that result.

2. Provisions protecting the man-woman definition from state-level judicial activism and innovations in other states likewise substantially advance these state interests.

Given the States' compelling interests in the benefits of man-woman marriage, and how the man-woman definition of marriage substantially advances those interests, states would be foolish not to protect that definition from internal or external threats. And that is what they did in the laws at issue here, as well as similar laws enacted in many other States.

With the legal birth of same-sex marriage in Massachusetts in 2003—at the hands of the State's judiciary in reinterpreting the State's 1780 constitution—the other 49 states were put on notice. First, unless the man-woman definition was explicitly protected in the state constitution, it could be easily overturned by state judges—perhaps by a single state trial judge interpreting the State's constitution. Second, genderless marriage would begin in Massachusetts, and with modern mobility, it would not be long before same-sex couples legally married in Massachusetts would relocate across the nation and seek for their marriages to be recognized in other States. Alternatively, same-sex couples from other States would turn Massachusetts into the Las Vegas of same-sex marriage, thereby allowing one State to export its preferred marriage regime to others—and thus single-handedly dictate national marriage policy. This desire to preserve man-woman marriage laws in the face of uncertainty as to the impact of a redefinition meant that a State's only means of preserving marriage redefinition decisions for its people

was to legally strengthen man-woman marriage, usually by placing it in the constitution.

This approach, moreover, ensured that some States could act as laboratories of democracy, while others could wait to see what would happen in those laboratories as a result of the change. See *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). As Justice Brandeis observed, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments *without risk to the rest of the country*." *Id.* (emphasis added). That feature of our federal system, however, would vanish (as to a particular issue) if the rest of the country were forced into the experiment. That is one reason Justice Brandeis warned his fellow Justices that "we must ever be on our guard, lest we erect our prejudices into legal principles." *Id.*

In short, constitutionalizing the man-woman definition of marriage, and refusing to recognize same-sex marriages from out of state, were the only possible responses for States that wanted not merely to preserve the benefits of man-woman marriage, but to leave decisions about redefinition in the hands of those best suited, and authorized by the Constitution, to make and bear the responsibility of that choice: the People.

C. Notwithstanding arguments by marriage reformers such as Judges Reinhardt and Posner, these laws are narrowly tailored

State marriage laws such as those at issue in this case are also narrowly tailored to achieve the States' compelling interests.

1. This Court has often held that distinctions based on genuine biological reality can generally withstand heightened scrutiny. See, *e.g.*, *Nguyen* v. *Immigration and Naturalization Service*, 533 U.S. 53, 65 (2001) (upholding a law that treated mothers and fathers differently because of "biological inevitability"). As the Court put it in *Michael M.* v. *Superior Court of Sonoma County*, 450 U.S. 464, (1981), because "the Equal Protection Clause does not demand that a statute necessarily apply equally to all persons or require things which are different in fact to be treated in law as though they were the same, this Court has consistently upheld statutes where the gender classification ... realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Id.* at 469.

The same principle applies here. The man-woman definition of marriage is grounded in fundamental biological differences between man-woman and same-sex unions. With all respect to same-sex couples, they are not situated similarly to opposite-sex couples as regards procreation; only the latter can create life spontaneously—and accidentally. The law cannot change biological fact, nor is it required to ignore it.

2. Under heightened scrutiny, moreover, a state law's classification need only be "narrowly tailored,"

not *perfectly* "tailored," and certainly not the *least* restrictive alternative. *Grutter*, 509 U.S. at 326 (2003). And the alternatives considered in that analysis must be both "workable," *id.* at 339, and "lawful." *Id.* at 339-40 (quoting *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (narrow tailoring "require[s] consideration of whether *lawful* alternatives and less restrictive means could have been used" (emphasis added)). They must also be "at least as effective" as the law in question at achieving the State's purposes. *Reno* v. *Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997) ("burden on adult speech is unacceptable if less restrictive alternatives would be *at least as effective* in achieving the legitimate purpose that the statute was enacted to serve.") (emphasis added); *accord Ashcroft* v. *Am. Civil Liberties Union*, 542 U.S. 656, 665 (2004) (to survive narrow tailoring "the proposed alternatives [must] be *as effective* as the challenged statute" (emphasis added)). And they must be less restrictive than the challenged law *with respect to the right asserted*. See, *e.g.*, *United States* v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803, 810 (2000) ("At the same time, § 504 was content neutral and would be less restrictive *of Playboy's First Amendment rights*." (emphasis added)); *Thompson* v. *W. States Med. Ctr.*, 535 U.S. 357, 371-72 (2002) ("The fact that all of [these alternatives] could advance the Government's asserted interest in a manner *less intrusive* ... indicated that the law was more extensive than necessary.") (internal quotation marks omitted) (emphasis added)).

Here, other than redefining marriage in genderless terms, Petitioners have never attempted to identify any less restrictive alternative that would satisfy these requirements. For example, they have not

sought a civil-union regime or any other legal structure for governing their relationships short of marriage. Accordingly, civil unions or similar arrangements cannot be considered in determining whether man-woman marriage laws pass strict scrutiny.

Petitioners, moreover, have not even argued that the alternative they propose—redefining marriage in genderless terms—would achieve the State's child-related purposes described above as effectively as the existing, gendered definition. Absent such an assertion—which seems implausible on its face—Petitioners' allegation that man-woman marriage laws are not narrowly tailored *to the States' own articulated interests* cannot get past the starting gate.

3. Petitioners' "overbreadth" analysis is equally flawed because it is premised on an unrealistic marriage law—one limited to couples that *actually* have both the capacity and intention to procreate. But that is not a legitimate alternative.

For one thing, Petitioners' alternative is not "less restrictive" with respect to the right asserted by the Petitioners—the right to marry the person of one's choosing. To the contrary, that alternative is *more* restrictive, since it would exclude not only heterosexual non-procreating couples, but also *all* same-sex couples. In short, merely excluding other non-procreating couples would not give Petitioners the right they seek—and Petitioners therefore have no standing to suggest such an alternative.

Nor is this alternative lawful or workable. As the Tenth Circuit acknowledged, a "law restricting the institution of marriage to only those who are able and willing to procreate would plainly raise its own constitutional concerns." *Kitchen* v. *Herbert*, 755 F.3d

1193, 1222 (10th Cir. 2014). Indeed, overinclusiveness critiques ignore the reality that marriage is in that respect overinclusive by necessity. The only way to *prove* fertility would be to conceive. But that would undermine marriage's function of channeling procreation into marriage and only marriage. Given the State's compelling interests in procreation and children's welfare, "[t]here is no real alternative to some overbreadth in achieving this goal." *Adams* v. *Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd on other grounds*, 673 F.2d 1036 (9th Cir. 1982).

In short, Petitioners' overbreadth analysis must be rejected because the alternative law on which it is premised is simply not a legitimate alternative.

4. Some circuit courts—including in the opinions by Judges Reinhardt and Posner—have likewise claimed that the man-woman definition pursues the States' interests in a manner that, in Judge Reinhardt's view, is "grossly over- and under-inclusive..." *Latta* v. *Otter*, 771 F.3d 456, 472 (9th Cir. 2014); *Bostic*, 760 F.3d at 381-82; *Baskin* v. *Bogan*, 766 F.3d 648, 661, 672 (7th Cir. 2014); *Kitchen*, 755 F.3d at 1219-21. For reasons beyond those outlined above, this claim is both wrong and irrelevant.

First, it evades the real issue: the effect of redefining marriage on the *institution* itself, and on all the norms that man-woman marriage reinforces. A State can freely allow infertile opposite-sex couples to marry (and avoid unconstitutionally invading their privacy) without having to abandon the man-woman definition and lose its accompanying and unique benefits. In fact, allowing infertile man-woman marriages *reinforces* rather than undermines the norms of marriage for a State's numerous man-woman couples who can reproduce accidentally—by communicating

to them that marriage is the norm. See Marriage Scholars at 8, 34. Hence, allowing marriages of man-woman couples who cannot procreate is fully consistent with the institutional norms of marriage. And infertile man-woman couples are the rare exception to the biological norm.[7]

Likewise, despite combined couple infertility, almost always one member of a couple can reproduce with someone outside of marriage. And marriage's channeling purpose is aimed not only at pre-marital procreation, but also at extra-marital procreation. Indeed, discouraging extra-marital procreation may be even more important because one result may be that, because of divorce, the children of *two* procreative unions are now raised outside the protections of marriage. See also Scholars of History & Related Disciplines Brief, I.D.

Second, overinclusiveness only addresses the channeling norm and disregards the other norms described above. When viewing man-woman marriage laws in light of the *cluster* of state interests they serve, such laws are neither over- nor under-inclusive. Therefore, a State's choice to preserve the man-woman definition is narrowly tailored—even perfectly tailored—to the State's interests in preserving those benefits and in avoiding the enormous societal risks accompanying a genderless-marriage regime.

Third, contrary to the Petitioners' assumption, allowing same-sex couples to marry requires far more

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[7] Only about 1.7% of women in the United States are considered nonsurgically sterile, with another 9.2% experiencing reduced fertility. Also, male fertility has been scientifically documented to extend late into life—as late as 94 years of age. *See* Marriage Scholars at 11.

than simply "relaxing" a regulatory restriction and thereby providing state recognition of the love and commitment between same-sex couples. To the contrary, as this Court noted in *U.S.* v. *Windsor*, "marriage between a man and a woman" has long been "thought of by most people as *essential to the very definition* of that term and to its role and function throughout the history of civilization." 133 S.Ct. at 2689 (emphasis added). That is why, as a matter of statutory drafting, allowing same-sex couples to marry requires not just the "recognition" of a new class of unions, but a fundamental legal *and* social redefinition of marriage—from an inherently gendered institution, i.e., a union of a man and a woman, to a genderless institution, i.e., a union of any two otherwise qualified "persons."[8]

Accordingly, the choice the States faced after 2003 was not a question of line-drawing. It was a binary choice: Either ensure as a matter of state law that marriage would continue to be defined in gendered terms, as it had been throughout the ages, or risk allowing it to be *redefined* in genderless terms—not through democratic means—but by state judges misinterpreting the relevant state statutory or constitutional provisions, or same-sex couples seeking to import genderless marriage from another state. In determining whether the resulting laws are narrowly tailored, those two non-overlapping options are the

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[8] This is symbolically evident on marriage licenses where "husband" and "wife" are replaced with Spouse 1 and Spouse 2.

This analysis also shows why what Petitioners seek is centrally different than what was at issue in *Loving* v. *Virginia*, 388 U.S. 1 (1967). There, marriage did not have to be redefined—marriage statutes did not have to be rewritten, and marriage certificates did not have to be modified. *See* Scholars of Originalism Brief at 12-14.

ones that must be considered—especially given that Petitioners here are claiming a right to marriage itself, not some other type of state recognition of their love and commitment.

Given that avoiding more fatherless and motherless children, keeping couples married, and supporting mothers are compelling state purposes, it is easy to see why the Respondents' decisions to retain their man-woman marriage definition (and protect it from judicial redefinition) were "specifically and narrowly framed to accomplish that purpose." *Grutter* v. *Bollinger*, 539 U.S. 306, 333 (2003). Indeed, faced with a binary choice of whether or not to redefine marriage in genderless terms, the *only* way States could avoid the incremental risk of more children raised without a father or mother—thereby suffering what this Court has called a "loss[] [that] cannot be measured," *Santosky* v. *Kramer*, 455 U.S. 745, 760 n.11 (1982)—was to opt *not* to redefine marriage or allow it to be redefined by its judges. Considering the choices before them, then, the alternative Respondents chose—retaining the man-woman definition—was not only narrowly tailored, it was the least restrictive means of furthering that compelling interest.

Accordingly, even assuming heightened scrutiny is appropriate, the laws that Respondents defend here—and others like them throughout the Nation—readily satisfy that standard of review.

II. Given the risks to children and society, adherence to settled principles of federalism and deference to democracy is especially important in this context.

Whether the Court affirms the decision below based on rational-basis review or heightened scrutiny, it is critical that the Court respect the choices made by the people of the Respondent States. As *Windsor* and *Schuette* v. *Coalition to Defend Affirmative Action*, 134 S.Ct. 1623 (2014), have recently reiterated, States and their people should be allowed to make important decisions of contested policy free from federal interference or Monday-morning judicial quarterbacking. As *Windsor* establishes, while the Fourteenth Amendment may impose some limits on the States' ability to *regulate* entry into and exit from marriage, the Constitution reserves the *definition* of marriage to the States—whether they choose the newer version or, by logical extension, the traditional gendered version.

1. Of course, *Amicus* firmly believes that States choosing to redefine marriage in genderless terms likely subject themselves—and their children—to substantial risks, including increased fatherlessness, reduced parental financial support, reduced performance in school, increased crime, substance abuse and abortions, and greater psychological problems—with the attendant costs to the State and its citizens. See Marriage Scholars at 9, 16. But given *Windsor*, a State, acting as a "laboratory" of democracy, is free to make that choice—and then to later change its mind, and reverse course. *New State Ice Co.*, 285 U.S. at 311.

Conversely, if the Court holds that the Constitution commands genderless marriage, the laboratory will be shuttered, and with it the ability of the People—regardless of their States' marriage policies—to reassess such a redefinition's long-term effects and change course if necessary. Such a scenario, moreover, will be even more confining and intrusive than the situation the States and their citizens faced after *Roe* v. *Wade*, 410 U.S. 179 (1973). At least there, States still had the autonomy to promote a culture of life in the second and especially third trimesters of a pregnancy. But with marriage, the definitional choice is binary; there is no middle ground and hence no room for policy diversity or innovation. Thus, forcing same-sex marriage upon the Nation would destroy, as to that issue, the "active liberty" of democratic-decision-making.[9]

If that were not bad enough, the result of such a decision would be two types of States—those who were free to choose marriage policy on their own because they chose the "correct" one—and States who could not be trusted in matters of marriage. Creating second-class States—and thus second-class citizenries—is incompatible with federalism.

2. Such a decision will also undermine the principle that the People—acting through their governments—are free to present their own viewpoint in the

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[9] "[T]he Constitution [is] centrally focused upon active liberty, upon the right of individuals to participate in democratic self-government." Stephen G. Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 21 (2005). For that reason, "judicial modesty in constitutional decision-making" is essential. *Id.* at 37; *see also id.* at 17.

marketplace of ideas. *See, e.g., Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U.S. 217, 229 (2000) ("[The government] is entitled to say what it wishes."); *Pleasant Grove City, Utah* v. *Summum*, 555 U.S. 460, 468 (2009) (finding that the government may "select the views that it wants to express...Indeed, it is not easy to imagine how government could function if it lacked this freedom.") (citations omitted). Here, States are sending a clear message to couples: man-woman marriage is the optimal place to beget and rear children. This is not a message belittling alternative arrangements—which the State does not single out or stigmatize or make illegal. Rather, the law subtly conveys a message of encouragement that this type of family structure provides the greatest benefits to the greatest number of children within the State. And thus the State will limit *some* benefits and *some* types of formal recognition (i.e., marriage) to the structure the People collectively view, based on years of experience, as most beneficial to society.

That message leaves individual citizens free to choose the sexual partner or partners of their liking, form families, and rear children in other arrangements. But the freedom to make such choices does not demand that the People—again, acting through their government—fully and formally affirm those choices, much less grant equal benefits to those whose choices do not equally benefit the state. See, *e.g., Rust* v. *Sullivan*, 500 U.S. 173 (1991) (upholding federal law prohibiting use of federal funds for medical counseling advocating or referring a patient for an abortion); *Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540, 550 (1983) ("Where gov-

ernmental provision of subsidies is not 'aimed at the suppression of dangerous ideas,' its 'power to encourage actions deemed to be in the public interest is necessarily far broader.'").

Thus, while New York, as *Windsor* held, may constitutionally send one message about marriage and parenting—that gender is irrelevant—Michigan may constitutionally send another—that gender is at the core of marriage and parenting. Otherwise the notion of federalism so eloquently explained in *Windsor* is a one-way street—a principle invoked only when it helps reach a pre-determined result.

3. Further, forcing States to adopt genderless marriage will not lead them to greater acceptance of same-sex couples, but will, as with abortion in the aftermath of *Roe*, lead to a partisan hardening of views that could have been avoided if the slower but surer path of democracy had been trod instead. Prior to a slew of federal decisions requiring States to adopt genderless marriage, the same-sex marriage movement was enjoying a wave of success at the polls or in state legislatures: From 2012 to 2014, the number of States that changed their laws to allow same-sex couples to marry nearly doubled—to 15.[10] The democratic momentum was in favor of same-sex marriage.

But that movement has now been put on hold, and the wave of favorable popular opinion has not only crested, but appears to be receding. See Brief of Opinion Expert Frank Schubert at al. at 18-22. Moreover, there are legitimate concerns about the religious lib-

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[10] The new ones were Maine, Maryland, Washington, Hawaii, Delaware, Minnesota, and Rhode Island.

erty implications of same-sex marriage. See Major Religious Organizations Brief. And in some States, opinions are hardening regarding the wisdom of extending nondiscrimination laws to gay and lesbian citizens.

In sum, judicial imposition of genderless marriage will create only the mirage of short-term gains while likely entrenching long-term harms to same-sex couples, their children, and society.

4. In short, to accede to Petitioners' demands for a judicially imposed redefinition of marriage would be to repeat the fundamental error of this Court's two most disastrous decisions—*Dred Scott* and *Lochner*. That is not to say that same-sex marriage is remotely like overtime labor, much less slavery. But as in those two infamous decisions, Petitioners want the Court to settle a contentious policy debate with a one-size-fits-all national solution that is not plausibly *required* by the federal Constitution.[11] And the subsequent history of those two decisions teaches that, no matter how compelling the policy justification for a major judicial innovation may seem at the time, the wisest course is to do what the Court did last Term in *Schuette*—let the People decide.

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[11] *See* Paulsen (noting that "in the structure and logic of the legal arguments made for judicial imposition of an across-the-board national rule requiring every state to accept the institutions, the two situations [1857 and 2015] appear remarkably similar."); Schaerr & Anderson ("as in *Dred Scott*, this is a debate about whether citizens or judges will decide an important and sensitive policy issue—in this case, the very nature of civil marriage.").

CONCLUSION

Just as "[t]he 14th Amendment does not enact Mr. Herbert Spencer's Social Statics," *Lochner*, 198 U.S. at 75 (Holmes, J. dissenting), so too that Amendment does not enact any particular marriage policy, whether Judge Reinhardt's, or Judge Posner's, or anyone else's. As it did in *Windsor* when the shoe was on the other foot, the Court should leave that choice to the people of the several States.

The Sixth Circuit's decision should be affirmed.

Respectfully submitted,

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